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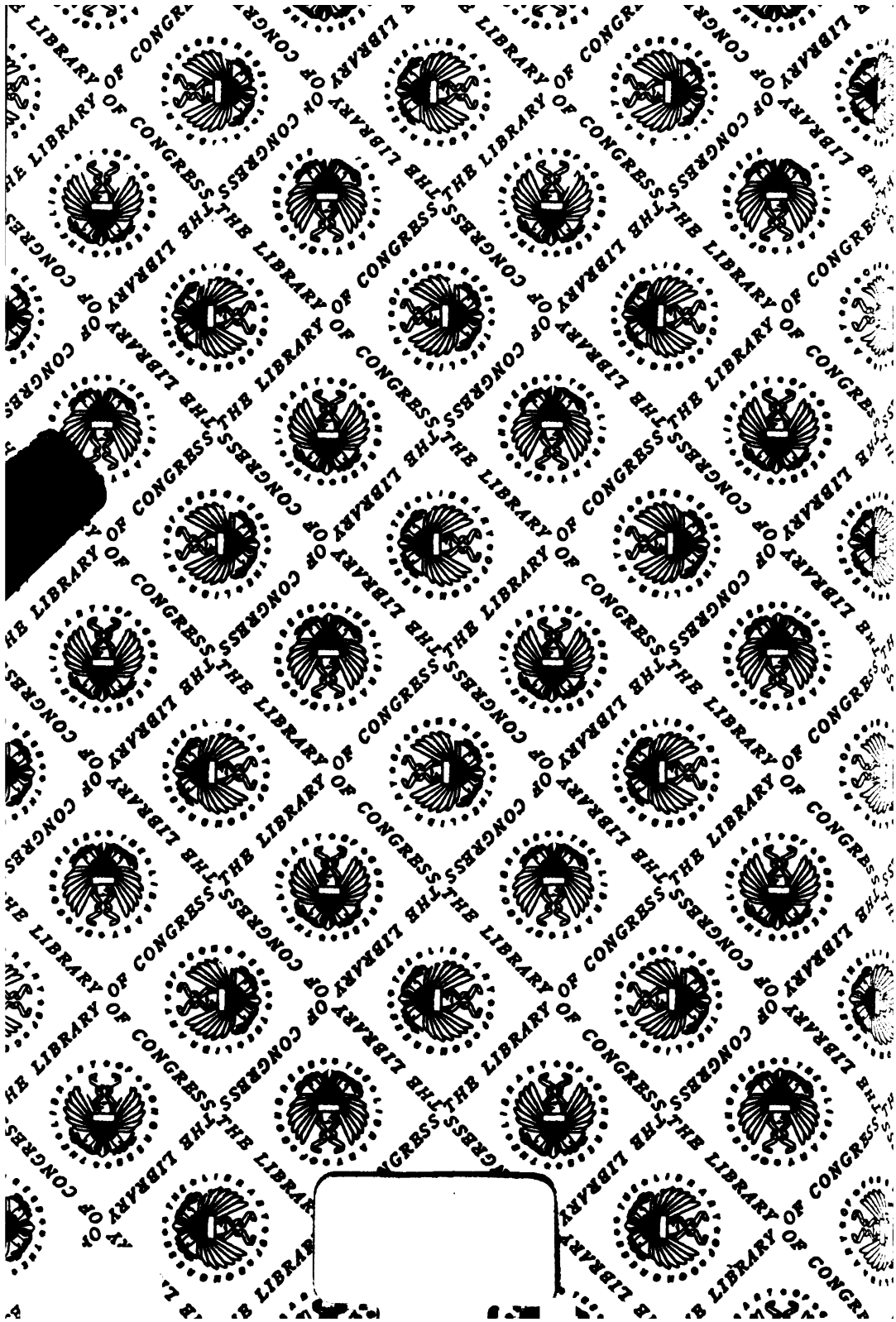
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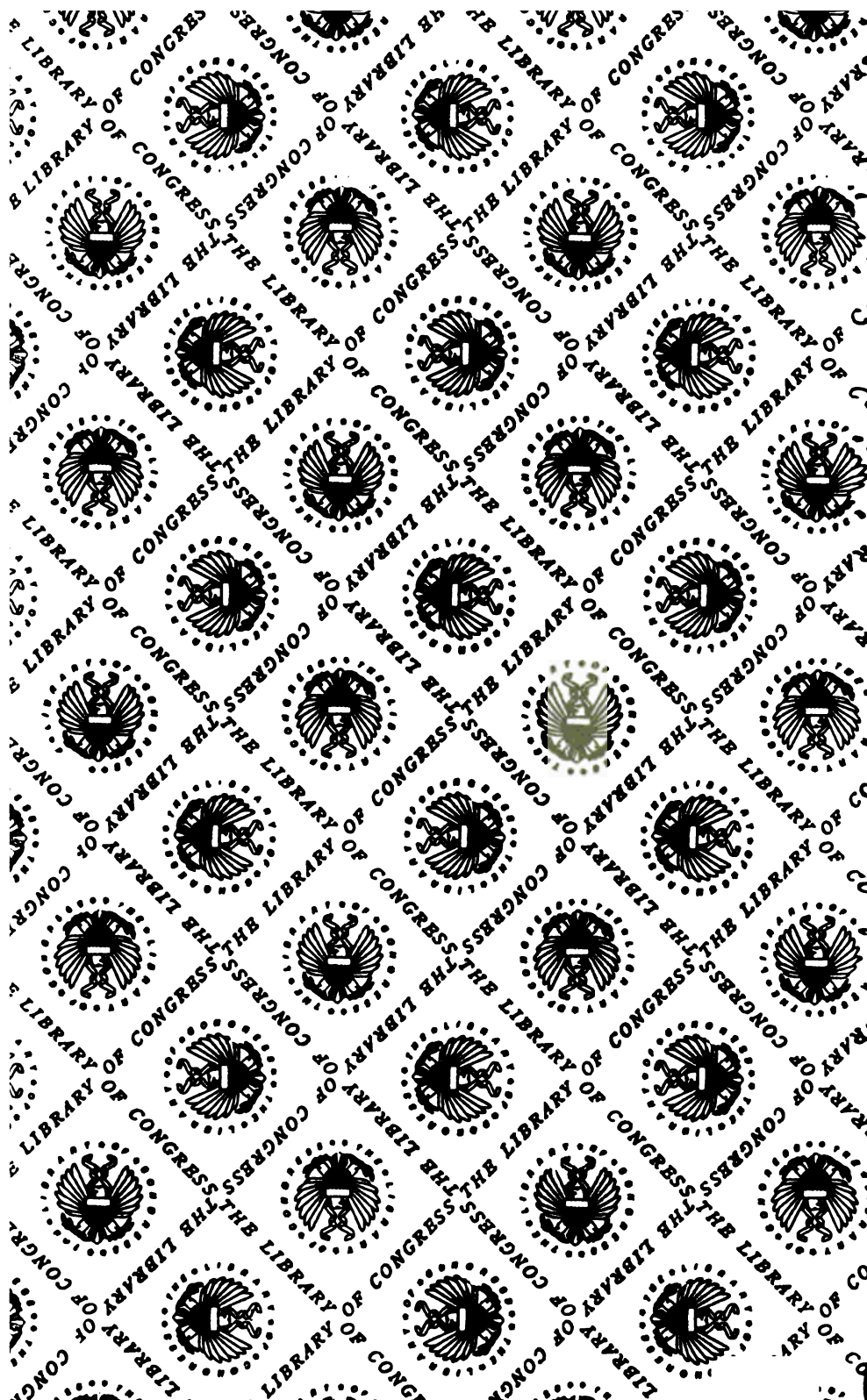
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TO AMEND CLAYTON ANTITRUST ACT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-FIFTH CONGRESS

SECOND SESSION

ON

H. J. RES. 166

Serial 45—Part 2

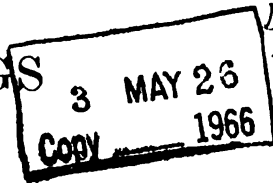
STATEMENT OF
MR. ALFRED P. THOM
WASHINGTON, D. C.

DECEMBER 6, 1917



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To amend Clayton Antitrust

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HOUSE OF REPRESENTATIVES.

SIXTY-FIFTH CONGRESS.

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AMENDMENT OF THE CLAYTON ANTI-TRUST ACT.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Thursday, December 6, 1917.

The committee this day met. Hon. Edwin Y. Webb (chairman) presiding.

The CHAIRMAN. Gentlemen of the committee, I want to lay before you House Joint Resolution No. 166, which proposes to extend to January 1, 1919, the effective date of section 10 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

I will read that portion of section 10 which affects the railroads:

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

We have with us this morning, at his request, Mr. Alfred P. Thom, who is the general council of the Railway Executives Advisory Committee, embracing about 90 per cent of the railroads of the country. He would like to be heard for a few minutes on the importance of suspending this section for another year.

Mr. Thom, the committee will be glad to hear from you.

STATEMENT OF MR. ALFRED P. THOM.

Mr. THOM. Mr. Chairman and gentlemen of the committee, the section now proposed by House joint resolution No. 166 to be extended has been twice extended by Congress. When the section was first considered and adopted by Congress I do not think anybody appreciated exactly what its effect would be. The railroads certainly did not. When it became necessary for the Interstate Commerce Commission, under its terms, to establish rules and regulations for its administration everybody then started in to study it, and it was found to be destructive, in the opinion of those of us who had been thinking about it, of a great many very substantial interests. That matter was brought to this committee and carried to the Judiciary Committee of the Senate, and the propriety of further consideration was realized, and the extension was ordered in order that attention might be given to the amendments which seemed proper to be considered.

Congress was busy, and you could not give the matter of amendments consideration before the date fixed for the section to become effective. Then, last February, Congress not having been able within the time to give consideration to the matter, another resolution was introduced and was passed by this committee and by the House of Representatives and by the Senate extending the effective date of section 10 of the Clayton Act until the 8th of January, 1918. Then the war came. Congress determined to give no consideration to any matter except war matters. There never has been a moment since the second extension resolution was passed when Congress was ready to give consideration to amendments. We have been ready at all times to present our views with respect to what should be done about it. We have from now until January 8. We are ready to go on. We are ready to bring our suggestions to the attention of Congress. That has been done. We have carefully formulated the changes which we think are essential in order to make this section workable.

The CHAIRMAN. You mean amendments which you think are essential to section 10?

Mr. THOM. Yes, sir. A bill has been pending in Congress since January 24 of this year having in view the introduction of amendments to this section.

Mr. VOLSTEAD. Who introduced it?

Mr. THOM. Mr. Carlin introduced that bill.

Mr. CARAWAY. I never did understand that there was any act passed to extend the time in order to permit amendments to be made; I thought it was to give the railroads an opportunity, to give them time.

Mr. THOM. That was certainly the request which I personally made of this committee.

The CHAIRMAN. There were three reasons. One was that the joint commission of the Senate and House would investigate all the lines of activity of the railroads and would report on this very matter, but that they had not reported, and we should wait until they reported to see whether or not section 10 should be continued. Then the Interstate Commerce Commission had not been able to provide rules and regulations for the purpose of carrying out this section, and the third reason was that in the meantime the railroads might present what they thought would be a workable section.

Mr. CARAWAY. Was that mentioned in the committee?

The CHAIRMAN. It was mentioned in the committee.

Mr. THOM. It was urged by the railroads before the committee.

The CHAIRMAN. No. I am talking about the action of the committee.

Mr. THOM. Of course I am not advised as to the deliberations of the committee, but I know it has never been in the minds of those who had responsibility to the railroads to do other than to urge at the proper time in the proper way upon Congress the amendments which we thought essential.

Mr. CARLIN. Has the Interstate Commerce Commission ever adopted rules and regulations putting this section into effect?

Mr. THOM. No, sir; they have had the matter under consideration, but they have not adopted them. As I say, time does not permit between now and the 8th of January for Congress to consider amendments, if that be the wish of Congress. So, knowing that one of the objects of this committee and of Congress was that the joint committee of the two Houses should consider this question along with others, I availed myself of the recent meeting of the joint committee held in San Francisco for the purpose of bringing this question up and seeing whether they would consider and suggest to the Judiciary Committees of the two Houses the amendments which they thought would make this a workable scheme. They gave me a hearing in San Francisco in November. Before we got very far, representatives of both Houses spoke up and said, "It is impossible to secure an amendment of this section before the 8th of January, and therefore, instead of undertaking to go into the merits of the proposed amendments, we will suggest to the Judiciary Committees of the two Houses that there should be a further postponement in order that deliberate attention can be given to suggested amendments."

Mr. CHANDLER. If you will permit an interruption, Mr. Carlin asked you if action had been taken by the railroads?

Mr. THOM. No; if I understand the situation, the railroads have been simply waiting; the section has not been in effect.

The CHAIRMAN. Mr. Carlin asked about the Interstate Commerce Commission. Section 10 has never been in effect.

Mr. THOM. Section 10, however, contemplates the formulation of working rules by the Interstate Commerce Commission; and, if I understood Mr. Carlin's question, it was what had been done, whether the rules had been formulated and adopted.

Gentlemen, I suppose that everybody will agree in the opinion that no time remains for an amendment, if an amendment is desirable. I want to lay before you briefly the reasons which we have for thinking an amendment desirable. We have no quarrel at all with the

philosophy of this section. It is intended to carry out the message and suggestions of the President of the United States to the effect that the buyer and the seller should not be the same, that the man who buys for the railroads should not also be the seller. In other words, that there is a fiduciary relationship which would be violated if there is not an independent buyer dealing with an independent seller.

We do not quarrel with that suggestion. We think that that is a salutary principle to be adopted by Congress, but we say that in adopting that principle there are many conditions which have not been appreciated by us and not brought to your attention. The first of these is this one: There are a great many railroad systems in the country that are made up of separate corporations. For example, the Union Pacific Railroad, running from Omaha to the Pacific coast, is made up of the Union Pacific itself, of the Oregon Short Line, and the Oregon & Washington Railway & Navigation Co.—three companies. They are all under the same management. They have the same chairman of the board, Judge Lovett, they have the same president, and they have the same board of directors. The Union Pacific owns the other two, but their corporate existence is kept separate. That is the actual fact about the Union Pacific. When we come to the Southern Pacific we find exactly the same situation to exist, only that in the Southern Pacific case it is impossible that it should be otherwise. The laws of the State of Texas make it impossible for a foreign corporation to own a line of railroad in that State. Wherever a system of railroads must run through Texas, the only way of effecting that is to have a Texas corporation to own the road in Texas and to have the securities of the Texas company owned by the dominant factor in the system. That is due to the domestic policy of the State of Texas.

MR. CHANDLER. Do you mind, at the expense of, may be, a moment's digression, telling us why Texas adopted such a policy as that?

MR. THOM. I do not know, except what everybody knows—that is, in some of the States there is very great jealousy as to having its corporations managed by any political authority except its own. Texas has adopted that policy. The Atchison, Topeka & Santa Fe line of railroad which runs into Texas is in exactly the same situation as the Southern Pacific. They can not own a foot of railroad in that State. If a part of a railway system is in Texas, the only way of having through operation is by this device of creating a Texas corporation to own the railroad and to have the stock of this Texas railroad company owned by some other member of the through system. That is the way with every through system running through Texas. Every through route partly in Texas and partly outside has been built up and is created in that way to-day.

There are other reasons which you gentlemen will appreciate for the existence of separate corporations. Suppose a railroad system wants to extend itself. It may be generally stated that there is no railroad system in the United States which is not encumbered by a mortgage, and it has become necessary, and it is true as a fact, that every one of these mortgages, with perhaps negligible exceptions, contains what is known as the after-acquired property clause. So

if one of the railroads wants in its own corporate capacity to extend itself, every foot of its property, as it is built, comes under the mortgage already existing, and there is no way of using the newly constructed property as a basis of borrowing money needed for the construction. Those provisions of the mortgage may be obviated by the creation of a new company, by creating a mortgage by the new company on the property it is constructing, and then solidifying the ownership through the means of the company whose line is extended taking the stock of this newly created company.

This situation does not exist merely with respect to railroad construction of through railroad lines, but it exists throughout the country with respect to a number of other subsidiaries of railroads, which are essential to their operation. I will illustrate again by the Union Pacific. The Union Pacific, in order to be assured of a fuel supply, has organized and owns entirely a coal company from which it gets its fuel. No other person is interested in any of the stock of the company; the whole of it is in the Union Pacific; but here again is the necessity for a separate company, in order to prevent the mortgage on the Union Pacific from attaching automatically to its newly acquired properties by virtue of the after-acquired property clause; otherwise, the new assets, as a means of raising money to develop these properties, would be rendered useless to them if the property had to come under a prior mortgage.

Mr. CARLIN. That is the part of section 10 that you really object to?

Mr. THOM. There are several things that I want to run over and express my views about.

Mr. VOLSTEAD. How does that affect a company that takes all of the stock?

Mr. THOM. It affects it in this way: Suppose that it is desired to improve the Oregon Short Line, the stock of which is owned by the Union Pacific as a part of its system—money has to be borrowed to do that. The way they do it at the present time is that the Union Pacific, which has had a good deal of money in its treasury, advances an improvement fund to the Oregon Short Line and takes into its treasury the securities of the Oregon Short Line, with a view, when the market is in proper condition, of selling them and reimbursing itself for this advance of money. If that has to be done by competitive bidding, if the Oregon Short Line can not issue its securities to the Union Pacific in payment of the advances which the Union Pacific has made, but must go and offer their bonds by competitive bidding, you will at once see that an influence in the direction of the separation of that system sets in, because somebody else may buy those securities and there would be a lessening of ownership and a lessening of capacity to deal with financial questions on the part of the parent company.

Mr. CARAWAY. Would it not be to the interest of the stockholders if the bonds were sold at the highest price?

Mr. THOM. There is no doubt that it is in the interest of the stockholders that the improvements of the Oregon Short Line should be guaranteed by the superior credit of the Union Pacific.

Mr. CARAWAY. Did not the violation of this very principle wreck both the Frisco and Rock Island railroad companies?

Mr. THOM. No.

Mr. CARAWAY. The court's decision was altogether in error?

Mr. THOM. No.

Mr. CARAWAY. They appointed a receiver for one in my home town.

Mr. THOM. I think not. I think you will find—

Mr. CARAWAY (interposing). To sue the president and board of directors.

Mr. THOM. I was answering your question when you interrupted me.

Mr. CARAWAY. I beg your pardon.

Mr. THOM. As I understand the Frisco case, the complaint was that a lot of those people had dealt for their private interest with those securities.

Mr. CARAWAY. Was not the complaint that they constructed short lines of railroad and overcapitalized them and sold them to the parent company for many millions of dollars more than they were worth when the same parties were the buyers and sellers?

Mr. THOM. Yes.

Mr. CARAWAY. And that is exactly what they could not have done if this section had been in operation?

Mr. THOM. No; the way to reach that—

Mr. CARAWAY (interposing). They could not have done that if this section had been in operation?

Mr. THOM. They probably could not have done it, nor could they have done it if we had the more philosophical method, which I hope Congress will adopt, of providing that there shall be no issue of securities unless the issue is supervised by the Interstate Commerce Commission. That is the way of dealing with it and it is not necessary to break up a system of railroads and separate it into small parts in order to accomplish that result. Where such a system exists—and it has been formed in response to economic necessity—it is an indication of what the public needs in respect to transportation and it is an important thing that it should exist. Is it necessary in order to have honesty in the issue of these securities to provide that you must break up a system of railroads? We want to suggest to you that the way to deal with the Frisco case and others is through a law of Congress which supervises and requires the approval of the Government before they can issue their securities.

Mr. CARAWAY. Would it interrupt you if I asked another question?

Mr. THOM. Not at all.

Mr. CARAWAY. Referring to your statement that it would be disastrous for some outside bidder to buy the securities, would it be anything but just, under the circumstances, to inquire what is the value of the securities in the market?

Mr. THOM. The railroads that take these securities take them at a price vastly higher than they could get from anybody else.

Mr. CARAWAY. Competitive bidding would do that.

Mr. THOM. There is your obstructing step to prevent a financial transaction which ought to be taken promptly. Of course, the idea of the Union Pacific taking into its treasury bonds which it could obtain the cash for, either at par or at a higher price, is, I think, utterly fallacious. They would be glad to do that. The reason they have to take them into their treasury is because they can not sell them and they have to advance the money as the only way of pro-

viding it. There is no railroad in Texas whose bonds, so far as I know, are worth what these companies have advanced in the way of money when one of these railroads was constructed. There is business sagacity in this question. They adopt this means of financing not for the purpose of getting an advantage over one of the subsidiaries, but as the only means of supplying the subsidiary with improvement funds. They do that on a better basis than they could do it by putting the bonds on the market. I should like to have you gentlemen hear the presidents of these railroads, such men as Judge Lovett, and have them tell you how these things are done and to consider whether or not that ought not to be permitted in the public interest, and whether it is not of sufficient importance for you gentlemen to take the time to go into the question and see whether, in the dealings between a railroad company and its subsidiaries, there should be a right on the part of these companies, under the supervision of the Interstate Commerce Commission in respect to the issue of securities, to take those securities without requiring competitive bids. In this proposed amendment, that is provided for in an early part, in one of the provisos.

Mr. VOLSTEAD. Is that the bill, H. R. 20450?

Mr. THOM. Yes, sir; introduced January 24, 1917. That appears as one of the things that is excepted from the operation of this section.

Mr. WALSH. May I ask you a question?

Mr. THOM. Yes.

Mr. WALSH. If that law had been in effect would it have prevented what was done by the New Haven road in Massachusetts and Connecticut?

Mr. THOM. I am not well enough acquainted with what was done in Massachusetts and Connecticut to know about that, but I think all of those things of which I know generally can be reached and ought to be reached through a law of Congress regulating the issue of securities by a public body.

Mr. VOLSTEAD. Ten or twelve years ago I introduced such a proposition which was very strenuously opposed by the railroads and everybody else.

Mr. THOM. I have no doubt it was.

Mr. VOLSTEAD. And you opposed it?

Mr. THOM. I hardly think it is a fair answer to an argument to say, "Why, this thing is right, but you opposed it some time ago."

Mr. VOLSTEAD. I am not suggesting that.

Mr. THOM. If we have changed our view on this subject we have done it in response to the conditions, and it does not make the proposition wrong that you introduced it 12 years ago and that we opposed it.

Mr. VOLSTEAD. I have kept on introducing it ever since, and I think some day it will pass.

Mr. THOM. I think that is the idea of this joint committee. The State commissioners have come before the Newlands committee and have advocated the lodging of the power of regulating securities in the Federal Government. We advocate it and I know of no interest that opposes it. So, I think, it is going to be adopted.

Mr. VOLSTEAD. Could not the expenditures be made by the parent company as such instead of being made through an independent company; would not that simplify the thing a good deal?

Mr. THOM. It could not be done. In the case of one State, I think the State would not permit it.

Mr. VOLSTEAD. Could not we by proper legislation force the State to permit it?

Mr. THOM. I think you could, but I think the chances of doing it are very remote. Then, there is another condition which I alluded to a moment ago, that is the mortgages of these railroads covering after-acquired property, and if a railroad itself made the extension the newly constructed property would come under the existing mortgage as the first lien, and the value of it for raising new money would be gone.

Mr. VOLSTEAD. I presume that we could even fix that by legislation.

Mr. THOM. I do not know about that.

Mr. VOLSTEAD. Would it not be of advantage, not only to the railroads but to the public, if these various subsidiary corporations were completely wiped out? Take, for instance, the Southern Railroad, which has a number of subsidiaries; would it not simplify the situation if you made it one corporation?

Mr. THOM. I think so; that is my personal opinion.

Mr. VOLSTEAD. And that could be done notwithstanding the trust law or any other law which we have?

Mr. THOM. I think so. I personally favor it. The special counsel of the Pennsylvania Railroad Co. is in the room, but I think it is the policy of the president of that company and his advisers to try to find a way in which the Pennsylvania system can deprive itself of its 149 corporations and make them one. I know that is their policy. My own opinion runs directly with yours. I think it is a proper thing, but it is a hard thing to accomplish.

Mr. VOLSTEAD. I can not see it. If they own the stock, they can own the physical property. I entirely agree with your view that it is the best thing to be done.

Mr. CHANDLER. The policy which you have referred to in Texas requiring a State corporation to take over the part of the road in Texas has not been hurtful to railroad building?

Mr. THOM. Railroad building is usually stimulated by the prospects of traffic in any territory, and they usually try to find a way around any legal obstacle in order to create the improvement which they hope in the end will be a valuable one. Texas is pretty well supplied with railroads, but Texas railroads have not proven a very profitable investment.

Mr. VOLSTEAD. Does not the number of corporations add largely to the expense of bookkeeping, officers, salaries, etc.?

Mr. THOM. I think so. It is the most economical and best thing to do; I agree with your views. That is one of the features that we want you to have an opportunity to inquire into. We want to bring these men before you to explain the matter for your information and to let you hear the case at first hand.

There is another suggestion. This will be illustrated by the New England situation. Maybe at some point in New England there is

difficulty about fuel. There may be but one concern from which at the moment you can buy fuel for the locomotives. The need may arise to order fuel over the telephone. An engine may come in without fuel and with only one fuel dealer in the place. That is certainly the case now not only in New England, but elsewhere. We think this law should be amended so that, where there is but one seller and therefore no competition possible, it shall not be necessary to ask competitive bids.

Mr. STEELE. Or there might be an article controlled by a patent?

Mr. THOM. Yes, sir; there might be but one manufacturer of an article, and that article controlled by a patent. That is another illustration. We think, where that is the case, there should be an exception made and competitive bids not required.

Here is another situation where we think competitive bids should not be required. The Southern and the Pennsylvania meet down here at the Potomac yards. Each has the rolling stock of the other in operation; they interchange rolling stock with each other. The custom now is that where the Pennsylvania has in its possession a loaded car of the Southern road and it is in bad order, it repairs that car in its own shops and charges the Southern Railroad with the bill.

Mr. CARAWAY. The bill itself permits them to do anything that does not cost more than \$50,000. The repairing of cars certainly would not exceed that amount.

Mr. THOM. I have no doubt but what the bill of one of those companies against the other to-day is more than \$50,000.

Mr. CARAWAY. Each car is a separate transaction, and certainly no one car calls for \$50,000.

Mr. THOM. The law says "in the aggregate in the year."

Mr. CARAWAY. That is one transaction?

Mr. THOM. That is one of a series of transactions. The bill for the year may be more than \$50,000 for the repair of cars. It is unwise to break up this system of buying.

Mr. CARAWAY. That does not have anything at all to do with repairing.

Mr. THOM. The purchase of material? How can you repair without purchasing material?

Mr. CARAWAY. When you have finished I want to ask you about another statement which you made before the committee.

Mr. THOM. Very well.

There is another thing that deserves, in our judgment, consideration by Congress. Here is the present method of purchase. Bids are taken now when supplies are needed. Then, the purchase is not made, as a rule, on those bids, but the lowest one of them is taken as a basis for negotiations to make it lower, and it is almost universal that the final dealing is on the basis of a proposition greatly below any competitive bidding. Mr. Spencer, the vice president of the Southern Railway, in charge of the purchase of supplies, estimated to me that that was worth more than a million dollars a year to the Southern road. The ability to negotiate with some of those gentlemen who bid to get a better price than any given—they do get better prices—he estimates that that is worth a million dollars a year to that road alone in the reduction of prices. Manifestly the

final price which is the result of negotiations is not one which is received by competitive bidding. We think that that is a matter which is in the public interest and should be permitted. We have expressed that in this language in one of the provisos:

Nor shall this section be construed * * * to prevent a common carrier after having taken competitive bids from negotiating with one or more of the bidders, without further competitive bidding, to reduce the price of supplies or to enhance the price of securities and accepting a better offer so arrived at.

The CHAIRMAN. Does the competitive bidding of the railroads apply to their own subsidiary corporations or to corporations in which they have stock?

Mr. THOM. This applies in this way, if I understand your question. Mr. Chairman. A railroad wants to buy a number of cars. It asks for bids from the car builders. The bids come in. It may be in some of the bidders that there may be some stockholder who is an official of the railroad, and under those circumstances there would have to be competitive bidding under the general terms of your law. The proposition is to have competitive bidding, but, when the bids come in, then to permit the purchasing agent of the railroad company to negotiate and try to get a still better price from one or more of those bidders.

Mr. CARAWAY. Now, all of the railroad men understand that such things are done and that it does not mean they are going to accept the bids, but use them to try to get a better price. Is not that understood?

Mr. THOM. I think that is done.

Mr. CARAWAY. Then, in submitting competitive bids they do not submit a price anything like they are willing to take, because they know that the bid is not going to be accepted.

Mr. THOM. They would do that even if the railroad did not have the privilege of beating it down. If the lowest bid has to be accepted, you deprive the railroad of the ability to get the purchase at a still lower price.

Mr. CARAWAY. Competitive bidding is a farce when they know that the bid is not going to be accepted, and that there are going to be further negotiations.

Mr. THOM. It is no farce. It saves the Southern Railway, as I am told, a million dollars a year.

Mr. CARAWAY. Why is it necessary to have competitive bidding; what good purpose does competitive bidding serve?

Mr. THOM. To ascertain what the men would supply these cars for in the case I have mentioned.

Mr. CARAWAY. But they knew that their bids would not be accepted?

Mr. THOM. I do not know whether they knew it or not. They knew that they would be accepted if they were low enough; but they were not low enough, and so there was a negotiation for a lower bid. If I understand the policy of Congress, it is to protect the carrier doing a public service against the improper expenditure of its money. You are not trying to make an opportunity for the seller of those supplies to sell as high as he can. There is no public interest in cutting the railroads off from an opportunity to buy these materials and

supplies on as favorable terms as it is possible for them to obtain nor from the exercise of any legitimate business method.

Mr. CARAWAY. I take it from your statement that no public competitive bidding ever results in a sale, that the companies just go and make private negotiations and that the seller knows that as well as the buyer?

Mr. THOM. I mean to say that in the Government we must have competitive bidding and that governments buy at the highest level of prices known to the trade. That is what I mean. I do not see any reason whatever for forcing the railroads, which have need of every cent of money they can get to create new facilities, into a position where they have to buy on the same high level as the governments do—your municipal government, your State government, and your National Government. It must buy on the competitive basis; we must pay the highest prices of any purchasers. If you can safeguard the matter by requiring competitive bidding and at the same time permit negotiations for better terms, it will have the effect of letting the carriers buy at a lower price (and the object of your legislation is to make them buy at a lower price)—it will prevent them from buying at a higher price.

Mr. CARAWAY. Do you not think that a law which required them to have competitive bids and at the same time permitted private negotiations would be a farce?

Mr. THOM. That is what I am arguing in favor of; I think it is the only wise thing to do.

Mr. WALSH. Could they make as advantageous a bargain if these public bids were not required to be submitted? Could they make a contract at such low prices if these public bids were not required?

Mr. THOM. I doubt whether they could if they asked no bids at all. Here is a system in which you gentlemen think it is proper to have competitive bidding, and we can buy cheaper by hundreds of thousands of dollars if you will allow us to negotiate after the bidding.

Mr. WALSH. You probably could not do that if there had not been competitive bidding?

Mr. THOM. Exactly. There is another case. Suppose we have had competitive bids and suppose that we have placed an order for a thousand cars, and, after we have placed that order for a thousand cars there is an indication that the market for materials is going to rise. We find very frequently that it is desirable for us to go to the contractor and say, "Will you give us 1,500 cars at the same price?" Why should we have to go through another competitive bidding, with a rising market, when these men who have assembled the material and labor are able to produce 1,500 cars, perhaps, cheaper than any other men who have not these advantages in preparation? Why should we not, in the public interest, be able to go and say, "We have gotten a bid from you for a thousand cars on the competitive basis, and now at the same price we will enlarge our order to 1,500 cars." We think that should be allowed. We have provided for that in this bill in the following clause:

Nor from enlarging or reducing the quantity of its proposed purchase at a price arrived at by competitive bidding or otherwise, as permitted by this section.

We think that is a reasonable thing to do.

We have also suggested that there may be cases, after competitive bidding, when the lowest bid is not, in the exercise of an honest business discretion, the best. We find, for instance, by a long course of dealing, that a certain concern makes an engine that fits in with our supplies better than any other make, that it does our work under conditions of temperature and use that are better than anything else we can get. The bid of such a concern may not be actually the lowest, and yet good business judgment might require the acceptance of a bid like that. If the exercise of the discretion is honest and it is really for the best interest of the company, then the bid should be accepted. It seems to me that we ought to have the right of honest business discretion in making selection among the bids submitted.

Mr. CARLIN. Is it not almost impossible during this war period for you to comply with section 10?

Mr. THOM. Yes, sir. I was coming to that. I am glad you have reminded me of it. Manifestly in the present situation the question is not one of competitive bidding; it is the question of getting the materials at all. There is an insufficient supply, and there is an increased demand for almost everything needed for the enlargement of the facilities of the railroads. At this time there certainly can be no difficulty about an extension of the period for the consideration of this section, because the railroads must be permitted to buy wherever they can find the needed article. The question is of finding it, not what we have to pay for it. Therefore no time will be lost by passing this resolution and taking up deliberately the questions which I have outlined here, because it is in the public interest in this war time that there should be the greatest possible facility of purchase, and every obstacle that is thrown in the way of it and every bit of time which is added to the purchasing period is against the public interest and tends to reduce the transportation capacity of the carriers.

I have suggested that the effective date of the section be extended until January 1, 1919, and for this reason: It gives you the time at this session to enact your law or not to enact it, as you see fit, to make amendments or not to make amendments, as you see fit, and it gives, after the probable adjournment of Congress, a short period to the Interstate Commerce Commission to formulate its rules under such laws as you may have adopted. Besides, January 1, 1919, is the beginning of the fiscal year of most of the carriers, a change having been recently made from the 30th of June to the 1st of January. An extension until January 1, 1919, would enable them to put in the new system with the beginning of the fiscal year and to adapt their new methods to their yearly accounts. These are the reasons which have induced us to ask that the period of extension be until January 1, 1919.

I understand that the joint committee of Congress, representing your body and the Senate, have written a letter to the chairman suggesting that this extension be given. Senator Cummins, who is a member of the Judiciary Committee of the Senate, as well as a member of the joint committee, has personally taken the matter up with the Judiciary Committee of the Senate in the belief that the extension should be granted.

We have a very earnest conviction, growing out of business considerations entirely, and with no hope and no wish to weaken the principle of your law, that these things to which I have referred are necessary to make the system workable. I would suggest that the section be amended in this way: Make no change in it except one. I would suggest that instead of having \$50,000 in the aggregate in any one year that it be \$50,000 in one transaction. That is the only change I would make in the first part of the section. My reason for this change is this: If a railroad makes a purchase in January of \$1,000, there is no telling but what before the end of the year it may buy more than \$50,000 from the same concern, and, consequently, where the standard is \$50,000 in the aggregate in any one year, there is no safe way but to commence with the first purchase and make that on competitive bids, no matter how small it is.

The CHAIRMAN. On the other hand, if they make a purchase of \$1,000, not contemplating an aggregate of \$50,000, they would not advertise; but if later on they found it necessary to buy \$49,000 more from the same company they would be in the position of having violated the law because they did not advertise?

Mr. THOM. Exactly.

Mr. WALSH. Will you briefly state why the Interstate Commerce Commission has not prepared its regulations?

Mr. THOM. Because Congress suspended the operation of the section and the commission thereupon suspended their preparation of rules until they knew what the law was going to be which it was their duty to administer.

Mr. DYER. Congress suspended the operation of the section until January?

Mr. THOM. Until January 8, 1918. The commission took up with the roads the matter of the regulations, and we had many conferences on the subject, and they made some progress; but when you suspended the operation of the section, they suspended their efforts to formulate the rules to see what the law ultimately would be which they were called upon to administer.

Mr. WALSH. Do you know the reason for the first suspension?

Mr. THOM. Just the reasons which I am giving you to-day. I came here and stated them just as I have to-day. You have never had an opportunity to consider whether they are well founded. I gave you the same reasons, just as I am giving them to you to-day.

Mr. CARAWAY. Referring to your statement with reference to the Southern Pacific, the Northern Pacific, and different corporations with reference to organizing separate companies and taking over the securities of the companies and afterwards putting them on the market, does the company take them as an actual purchaser or merely as security for the funds advanced?

Mr. THOM. My idea is that they take them—and I answer you now without any special knowledge of the situation—in payment of the advance.

Mr. CARAWAY. They become outright purchasers?

Mr. THOM. Yes, sir.

Mr. CARAWAY. Taking them merely as securities they would be able to do that under the provision of section 10?

Mr. THOM. Merely as securities?

Mr. CARAWAY. Yes, sir.

Mr. THOM. Do you think that is possible? Would not that be dealing in securities?

Mr. CARAWAY. From what you say.

Mr. THOM. I have tried to clear that up.

Mr. CARAWAY. A year ago you stated that that would be permissible. That is the reason why I ask you now.

Mr. THOM. If this was permissible a year ago, it would be now. I think it would not be dealing in securities, but we thought it advisable to make that clear on the face of the act.

Mr. CARAWAY. There would be no interference with the financing and construction of the new line, because they do not intend to keep them; they intend to sell them.

Mr. THOM. They may be hampered. To make that absolutely certain, I have put this in:

That nothing in this section shall be construed as applying to the borrowing of money, nor to the pledge as security for money borrowed of securities.

Mr. VOLSTEAD. On page 3 of this proposed bill you exempt the borrowing of money and the pledging of securities from the operation of this provision?

Mr. THOM. Yes, sir.

Mr. VOLSTEAD. Would not that largely destroy the effect of the bill?

Mr. THOM. No, sir; I do not think so. That is put in there to make clear the proposition that this gentleman has just referred to, as to whether or not the bill was intended to cover that. It still leaves the sale of the securities absolutely covered by the bill. Very frequently a situation of this kind arises, a railroad company needs to borrow \$10,000 from a bank and they must put up securities for it. Manifestly Congress, I think, does not intend that that transaction shall be a matter of competitive bidding.

Mr. VOLSTEAD. Is not that language too broad and would not that permit the dealing in securities in almost any form?

Mr. THOM. The whole thing that we are trying to guard against is this, that temporary borrowing of money where we pledge securities need not be done under competitive bidding.

Mr. VOLSTEAD. I can see why that may be proper.

Mr. THOM. If the language here suggested is not proper, you can make it so.

Mr. VOLSTEAD. It seems to me that any security can be easily sold by being pledged and in that way you could accomplish the very thing that you want to prevent.

Mr. THOM. There is this safeguard, usually the amount of money borrowed is very small. You could not accomplish it in that way. Very frequently a company has to go and borrow money from a bank like an individual.

Mr. VOLSTEAD. And put up the bonds of a new railroad.

Mr. THOM. If you could go to a bank and put up the whole issue, that would be unquestionably possible, but in effect you can not do that. The only borrowing you can do is for temporary purposes.

Mr. VOLSTEAD. For the small temporary loans I can see very readily that this bill should not apply, but it seems to me that there should be some guard.

Mr. THOM. We have no objection to your guarding it in any proper respect.

Mr. VOLSTEAD. If we pass a law regulating that in this way, they might be able to accomplish to some extent the same purpose.

Mr. THOM. That might be true.

Mr. VOLSTEAD. If that is to remain in the bill, it should be guarded, because I think the transfer of securities has been a vicious method.

Mr. THOM. I see your point. It is not our purpose that the power be so extensive as to produce that result.

The CHAIRMAN. In this connection I should like to read a letter which I have received from Judge Adamson, as follows:

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
December 5, 1917.

Hon. E. Y. WEBB,

Chairman Judiciary Committee, House of Representatives.

DEAR SIR: While the joint subcommittee raised under joint resolution 60 to investigate transportation was in session in San Francisco, Cal., recently, the members informally considered a request to recommend to the Judiciary Committees of the Senate and of the House that the effective date of section 10 of the Clayton Act be further suspended in order to give an adequate opportunity for considering proposed amendments. The committee was of the opinion that no time now remains before January 8 (the date on which the present suspension expires) for the consideration and adoption by Congress of any amendments that may seem to be proper.

Doubting how the action might be construed on the line of authority or propriety, the members of the committee informally agreed that Senator Cummins should make a statement to the Judiciary Committee of the Senate and that I should make a statement to the Judiciary Committee of the House expressing the opinion of the members of the committee that the extension ought to be made.

Yours, truly,

W. C. ADAMSON.

(Thereupon the committee adjourned.)

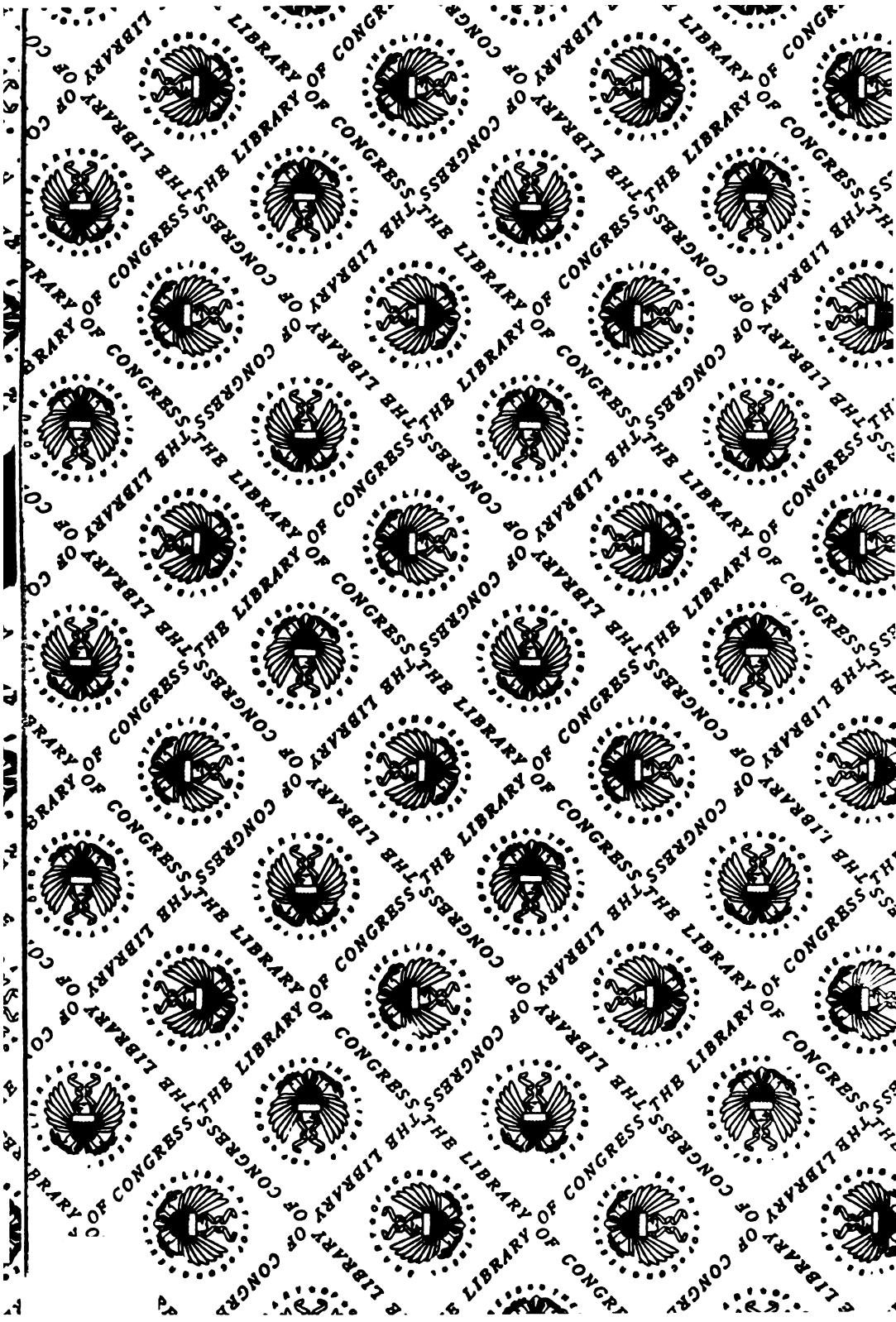
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